Supreme Court, U.S.
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RECORD
ARG
BRIEFS

No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF

Petitioner the Republic of the Sudan respectfully submits this supplemental brief pursuant to Rule 15.8 of the Rules of the Supreme Court of the United States in order to bring to the Court's attention a diplomatic communication sent by the Embassy of the Republic of Austria to the U.S. Department of State on April 11, 2017, regarding the decision on review before this Court. The diplomatic communication was not in existence or available to Sudan at the time Sudan filed its Petition for Writ of Certiorari. Austria's diplomatic communication is reproduced at App. 1a-4a.

CONCLUSION

The Republic of the Sudan respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

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Ref. PROT/016/2017

Note Verbale

The Embassy of the Republic of Austria presents its compliments to the US Department of State and – with reference to the petition for a writ of certiorari in the case *Republic of Sudan v. Rick Harrison* under review by the U.S. Supreme Court – has the honor to inform the Department of State, in support of the arguments already raised in the *amicus curiae* brief submitted by the U.S. Government before the Second Circuit Court of Appeals, of the following position of the Republic of Austria:

1. Like the United States, Austria has a strong interest in defending a consistent interpretation of customary international law and the Vienna Convention on Diplomatic Relations of 1961 relating to service of process on foreign states. In the case *Harrison v. Republic of Sudan,* the U.S. Foreign Sovereign Immunities Act (FSIA) was construed to allow service on a foreign state via the latter's embassy in the United States if the legal documents are addressed to the foreign minister. That interpretation is inconsistent with international law, undermines the general application of the international duties incumbent on all states, creates a dangerous precedent of general application and is likely to result in an excessive

number of judgments in default of appearance by the defendant state.

2. Austria shares the opinion of the U.S. Government that, independently of the particular case in question, the FSIA must be understood in the light of the recognized rules of international law.

3. In the absence of applicable international agreements or unilateral acts, the service of foreign legal documents on a sovereign state has to be effected through diplomatic channels to the foreign ministry of the state concerned. This rule of customary international law is reflected in Article 22 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) and corroborated by the practice of numerous states as well as judicial decisions.

4. In *Wallishauser v. Austria*, which involved an employee of the U.S. embassy in Vienna, the European Court of Human Rights (ECtHR) held that "according to a well-established principle of international law a rule enshrined in a treaty could be binding on a State as a rule of customary international law even if the State in question had not ratified the treaty, provided that it had not opposed it either." The Court noted in that context "that the United States did not object to the rules contained in Article 20 § (1) (b) (i) and § 2" of the 1991 Draft Articles on Jurisdictional Immunities of States and Their Property, which became Article 22 of the above-mentioned Convention, and that while the United States has not signed or ratified the 2004 Convention, it did not vote against it." (ECtHR, Case of *Wallishauser v. Austria*, Application No. 156/04, Judgment of 17 July 2012, paras. 66 and 69.)

5. Thus, service of process on a foreign state via its embassy in the forum state contradicts this rule of customary international law.

6. Furthermore, Article 22 of the Vienna Convention on Diplomatic Relations (1961) establishes that neither judicial nor administrative acts of public authority by the receiving state are to be exercised on the premises of the diplomatic mission. This includes service of foreign legal documents, both directed at the diplomatic mission itself or at the respective foreign state.

7. In its Commentary on the equivalent provision in the Draft articles concerning diplomatic intercourse and immunities, the International Law Commission (ILC) stated: "A special application of this principle is that no writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry ou,t their duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry of Foreign Affairs of the receiving State." (Report of the ILC to the General Assembly, UN Doc. A/3623 (1957), in Yearbook of the ILC 1957, Vol. II, United Nations (New York, 1958), p. 137.)

8. Service of foreign legal documents that is not in accordance with the above rules and procedures is to be considered contrary to and therefore not effective under international law.

A copy of this Note Verbale will be transmitted to the counsel of the petitioner in the above-mentioned case.

The Embassy of the Republic of Austria avails itself of this opportunity to renew to the US Department of State the assurances of its highest consideration.

Washington, D.C.
April 11, 2017 [SEAL]

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